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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 403

ALVIN B. SAWYER, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Alvin B. Sawyer, your petitioner, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cases on August 19, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not as of this date reported in the official or unofficial reports. The opinion of the United States Court of Appeals for the Fourth Circuit is hereto appended.

JURISDICTION

The judgments of the Court of Appeals affirming the judgments of the District Court were entered on August 19, 1961. Upon application of the petitioner, and for good cause shown, the Court of Appeals on August 30, 1961, ordered that its mandates be stayed pending application of the petitioner in the Supreme Court of the United States for a writ of certiorari to the Court of Appeals. The jurisdiction of this Court is invoked under the provisions of 28 USCA, Section 1254(1).

QUESTIONS PRESENTED

Case No. 8265 in the Court below.

1. Should the petitioner's motions for judgment of acquittal made both at the conclusion of the government's evidence and at the conclusion of all the evidence have been allowed?

2. Did the Court commit prejudicial error in permitting the government to offer evidence over the objection of the petitioner that the officers later on the day of the particular investigation, to wit, August 14, 1959, discovered an illicit distillery and related materials approximately 500 yards from the petitioner's house and lot?

3. Did the Court commit prejudicial error in permitting the government to offer evidence over the objection of the petitioner that Officer Gaskill within twelve months preceding the arrest of the petitioner, assisted in the destruction of two distilleries in "this area", one of said distilleries being at least 1000 yards from the petitioner's premises?

Cases Nos. 8264 and 8263 in the Court below.

4. Did the Court commit prejudicial error in that following the conviction and sentence in Case No. 8265 in the Court below, upon motion of the probation officer, petitioner's probation was revoked and he was ordered to serve the sentence imposed in earlier cases, said orders of revocation being predicated as a matter of law upon said conviction in case No. 8265 below?

STATUTE INVOLVED

"It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5.000, or imprisoned not more than 1 year, or both." Title 26, USCA, Chapter 51, Section 5686(a).

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Case No. 8265 in the Court below came on for trial in the Washington Division in the Eastern District of North Carolina, on October 31, 1960, before Honorable Algernon L. Butler, District Judge, and a jury. The bill of indictment charged petitioner, Alvin B. Sawyer, et al, with unlawfully possessing property intended for use in violating the provisions of the Internal Revenue Code pertaining to distilled spirits, in that petitioner allegedly possessed 1260 pounds of sugar and nine 5-gallon jugs in violation of Title 26, United States Code, Section 5686(a).

As the close of the government's evidence and at the close of all of the evidence, petitioner, through counsel,

moved for judgment of acquittal. Both motions were denied.

At the close of all the evidence and the charge of the Court, the jury returned a verdict of guilty as to petitioner and other co-defendants. Thereupon, W. T. Woodard, Jr., Chief United States Probation Officer, for the United States District Court, Eastern District of North Carolina, moved the Court in Case Nos. 8263 and 8264 below for the revocation of petitioner's probation. In these two cases, petitioner had earlier been convicted of violation of the Internal Revenue Laws relating to the manufacture of non-tax paid whiskey, and had been sentenced and placed on probation. Following the conviction and sentence in case No. 8265 below, upon motion of said Probation Officer, petitioner's probation was revoked and he was ordered to serve the sentences imposed in said earlier cases. The orders of revocation of probation in the earlier cases were predicated as a matter of law upon the conviction in Case No. 8265 below.

In summary, the evidence is as follows:

That shortly after midnight on August 14, 1959, B. V. Halstead, an ABC Officer of Pasquotank County, together with A. D. Baum, an ABC Officer of Pasquotank County, and Jack Gaskill, an Investigator for the Alcohol and Tax Unit of the United States Treasury Department, went near the premises of the petitioner about eight miles north on Highway No. 17 from Elizabeth City, North Carolina and maintained a surveillance of the premises; that Officer Halstead about 2:30 A.M., observed an automobile coming south down the highway and the lights went off on said automobile; that said automobile continued down the highway and turned into the petitioner's yard, whereupon

one of the occupants of the vehicle opened the garage doors and another occupant drove said vehicle into the garage and the doors were then closed; that Officers Halstead and Baum went to the garage under cover of darkness; that said Officers observed the two occupants of the vehicle unloading a quantity of sugar and jugs therefrom; that the two occupants of said vehicle were William Edward Griffin and Willie Swain, co-defendants in this action; that after observing this activity for a few minutes Officers Halstead and Baum entered the garage; that the garage is a separate building from the petitioner's dwelling house, located in the vicinity of 40 feet from it; that after some period of time elapsed Officers Halstead and Baum went to the petitioner's dwelling house and knocked on the outside doors; that the petitioner came to the front door with his bedroom slippers and trousers on and stated to the officers that their knocking and calling to him had aroused him from sleep; that the officers stated to the petitioner they wanted to talk to him about the sugar in the garage; that he, petitioner, didn't know anything about it. Petitioner went out to the car and asked the two boys what they meant by bringing it to his garage. They said, "We thought it was the place to bring it to but I reckon we were wrong"; that the officers found a green boat tied up at a canal near the petitioner's property, and wheelbarrow tracks or a path leading to a garden adjacent to the canal and near where the green boat was tied up; that over objections of petitioner, the Government offered evidence that an illicit distillery was found as much as 400 yards down the canal from the petitioner's property, off of the petitioner's property and 75 feet or more from the side of the canal opposite the side on which petitioner's house and lot were located; that altogether the illicit liquor

distillery was located as much as 500 yards from petitioner's property; that the co-defendants, Griffin and Swain, denied to the Officers that they knew petitioner or that they had ever seen him before; the petitioner denied to the Officers that he had any knowledge of the materials and denied any knowledge or connection or ownership of the illicit distillery.

On cross examination Officer Halstead testified that co-defendants Swain and Griffin said they must have got to the wrong place; that Swain said it was the wrong place; and Griffin said it sure was the wrong place; that there was a filling station known as the Hudson Filling Station located on the same side of the highway as the petitioner's residence about 150 yards north of the Sawyer residence; that there was a boat dock to the rear of the Hudson Filling Station, with boats in the dock, and a ramp for launching boats; that the illicit distillery site was accessible from this boat dock, and it was about the same distance from the boat dock to the distillery site as from the petitioner's residence to the distillery site; that a path led by the Hudson Filling Station from the highway to the boat dock; that the boat dock provided access to the canal; that there were other means of access to the distillery site than across the petitioner's lot, that one could go to the distillery site from the boat dock at the Hudson Filling Station, from the highway at the point where the canal intersects the highway, and by crossing the Pasquotank River which lies considerably to the eastward of the petitioner's lot; that the Pasquotank River is narrow—from 60 to 100 feet—at the point where the canal intersects the Pasquotank River; that the Officers had a search warrant when they went on the petitioner's lot, but there is no evidence that they found any materials on the premises other than what they ob-

served the co-defendants Griffin and Swain unload from the vehicle driven on the lot by them; that the Officers never at any time saw the petitioner at the distillery site, and the only place they saw him was at the door of his home after they had aroused him from sleep and when he accompanied them to the garage.

ABC Officer Baum testified for the Government in substance, that he accompanied Officer Halstead on the night of this investigation; that he knocked on the door of the petitioner's residence, called to him and he came to the door dressed in his pants and bedroom shoes; that the petitioner appeared to have just gotten out of the bed; the petitioner stated that he had just awakened; that petitioner denied knowing anything about the materials which the co-defendants had placed in the garage; that the co-defendants, Griffin and Swain, denied that they knew petitioner; that the co-defendants stated that they had brought the materials to the wrong place; that the distillery site was accessible from the boat dock and canal at the Hudson Filling Station; that the distillery site is accessible from the Pasquotank River, the Pasquotank River at the point where the canal leads into it being only 50 to 100 feet in width; that the petitioner denied any connection with or ownership of the distillery; that the petitioner stated that he did not know anything about the distillery, and no charge was against him in that connection.

ATU Officer, Jack Gaskill, testified for the Government that he accompanied the other Officers on this investigation; that he heard the petitioner ask the two co-defendants what they were doing in his garage with sugar; that co-defendant Swain replied that he had been instructed by a man who hired him to bring the

sugar from Virginia to carry it to a place in North Carolina, and he thought he was to the right place but he had gotten to the wrong place; that later that day Officer Gaskill went to the distillery site, not on petitioner's lot, but about 500 yards from petitioner's lot; that at the entrance to the still path something had rubbed against a tree that had left the appearance of green paint on it; that there were boats in the boat dock behind the Hudson Filling Station, and Officer Gaskill did not know whether or not at various times there were green boats in the boat dock; over objection of petitioner Officer Gaskill testified that in the 12 month period prior to the date of this particular investigation he had assisted in the destruction of a distillery twice the distance from the petitioner's lot as the one discovered on the day of the investigation; Officer Gaskill diagrammed for the Court and jury the neighborhood under consideration and pointed out at least four residences in the immediate area, including the residence connected with the Hudson Filling Station, besides the residence of petitioner; that the distillery site discovered on the day of the particular investigation was partially behind the Hudson Filling Station in terms of direction; that the distillery site was accessible from the canal at the highway, from the boat dock behind the Hudson Filling Station and from the Pasquotank River; that automobiles and trucks could drive to the boat dock at the Hudson Filling Station; that Officer Gaskill did not know how many boats were in the boat dock at the Hudson Filling Station at different times; that Officer Gaskill went to the distillery site without crossing the petitioner's lot; that the distillery site found near the Pasquotank River within a year prior to this investigation was about a half mile from the petitioner's lot and property; that

the distillery site found on the day of the investigation was about a quarter of a mile from the highway and the petitioner's property; that there was a little path leading over from the petitioner's garage to a garden back of the petitioner's property.

G. M. Hudson, owner and operator of the Hudson Filling Station, testified for the petitioner that he had been operating the filling station about ten years; that he closed his place of business usually around eight o'clock at night; that the boat dock had been behind the filling station approximately four years; that many people had used the boat dock for the purpose of going down the canal, both with and without his permission; that boats could navigate the canal from the highway on to the Pasquotank River; that various and sundry people used the canal for fishing and hunting purposes; that after the closing of his business at night the boat dock and canal could be used without his knowing it; that a roadway leads from the highway by the filling station to the boat dock; that he had seen people using the boat dock after he had closed his business; that he had seen them using it mornings before he got up; that some of them were strangers from Virginia; that he sleeps on the opposite end of the house from the roadway leading to the boat dock.

Co-defendant, Willie Swain, testified in his own behalf that he is employed by the Government in Norfolk, Virginia; that shortly before August 14, 1959, a man by the name of "Pete" employed him to drive a car on this particular trip; that "Pete" instructed him that a vehicle would drive ahead of him on Highway 158; that at a certain time and place the leading vehicle would turn around and flash three light signals toward co-defendant Swain at which time co-defendant Swain would turn into a path to his right; that the

leading car disappeared on the night in question, did not in fact give any light signals to co-defendant Swain, and if in fact such signals had been given the path that co-defendant Swain would have been signalled to turn into under the instructions would not have been on the same side of the highway as petitioner's premises; that as co-defendant Swain was travelling along on the journey he became frightened by lights which seemed to be following him at some distance; that he cut the lights off on the vehicle he was operating and drove over on the Hudson Filling Station lot; that he then continued along the highway in search of a place to unload the materials in the vehicle and make a getaway; that upon seeing the Sawyer garage he decided to unload the vehicle and then find his way back home; that he did not know the petitioner, had no instructions to take materials there, but simply left the materials there when he became frightened by lights that appeared to be following him.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner was indicted for alleged violation of Federal Statute 26 United States Code, Chapter 51, Section 5686(a), hereinbefore cited and quoted.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) There is no direct evidence to connect petitioner with the commission of the alleged crime. The evidence offered is circumstantial, conjectural, and speculative. All that is shown may be true, and petitioner be innocent of the crime charged. In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that

of guilt. Evidence which merely creates a suspicion of guilt is not enough. The crucial question in this case is whether the circumstantial evidence offered is such that logical and legitimate inferences may be drawn therefrom to support the factual conclusion that the petitioner was a party to the alleged crime. It is submitted that the correct answer is "no". However strong the suspicion may be, it seems that supposition and conjecture must be invoked to reach such factual conclusion. *Scott* v. *United States*, (Tenth Circuit) 145 F. 2d 405, at page 408; *Kassin* v. *United States* (5 Cir.) 87 F. 2d at page 184; *Cochran* v. *United States* (8 Cir.) 41 F. 2d 193, 206; *Cartello* v. *United States* (8 Cir.) 93 F. 2d 412, 414; *United States* v. *Russo*, (3 Cir.) 123 F. 2d 420, 423. *Spalitto* v. *United States* (8 Cir.) 39 F. 2d 782; *Sutton* v. *United States*, (5 Cir.) 131 F. 2d 108.

(2) The Court committed reversible error in allowing the Government to introduce evidence over objection of the petitioner of the discovery by Government agents on the date of petitioner's arrest of an illicit distillery located approximately 500 yards from his residence. It is submitted that the evidence is insufficient to show conscious possession on the part of the petitioner. Consequently, such evidence was not competent to show any intent on the part of the petitioner.

(3) The Court committed reversible error in allowing the Government to introduce evidence over the objection of the petitioner of the destruction of two illicit distilleries by Government agents in "this area" within the twelve months preceding the arrest, one of which distilleries was located at a distance of approximately 1000 yards from petitioner's premises, and there being no evidence as to the distance the other distillery was

located from petitioner's premises. The opinion of the Court of Appeals indicated that it has some doubt regarding the competency of this evidence. The following statement appears in that opinion: "If it was error to admit such evidence as too remotely related in time and place to the charge contained in the indictment, the error was harmless and will be disregarded." Evidence of a vague and uncertain character, offered to show that the accused might be guilty of a similar offense, should not be admitted under any pretense whatever, nor is mere suspicion, or proof of a suspicious circumstance, sufficient. Before guilty intent may be inferred from some other similar crime, such similar crime must be established by evidence which is legal, competent, plain, clear and conclusive. 22 CJS, Criminal Law, Section 690, page 1112. Evidence of another distinct offense not connected with the crime charged is not admissible in a prosecution for the violation of a liquor law. 22 CJS, Criminal Law, Section 691, page 1145. *Echikovitz* v. *U. S.*, CCA Wis. 25 F. 2d 864. Evidence which has no tendency to establish the guilt or innocence of the accused and which if effective at all, could serve only to prejudice or mislead, or excite the minds and inflame the passions of the jury should not be admitted. 22 CJS, Criminal law, Section 600, page 922. In a prosecution for possession of sugar and other property for alleged use in violation of Title 26, USCA, Section 5686(a), the Court committed prejudicial error in admitting evidence of defendant's alleged reputation for violating liquor laws and evidence of conviction for conspiracy to violate Internal Revenue Statutes eight years earlier. *Benton* v. *U. S.*, CA NC 1956, 233 F. 2d 491. How can it be said or known that this incompetent evidence was harmless to petitioner. For all that appears, this in-

competent evidence might very well have been the decisive factor in the minds of the jurors.

(4) If the conviction in Case No. 8265 below is not sustained, either for lack of evidence or for incompetent evidence, then, in such event, the Court's orders of revocation of probation in cases Nos. 8264 and 8263 below should be vacated. It is true that Courts have certain discretion with reference to probation. However, the Court in this instance did not exercise discretion, but instead predicated its decision to revoke probation as a matter of law on the conviction in Case No. 8265 below. Consequently, it necessarily follows that if there is error in Case No. 8265 below then the orders of revocation of probation in Nos. 8264 and 8263 below are error.

CONCLUSION

This petitioner should not be required to serve a prison sentence on the evidence appearing on this record, or, if it should be determined that the evidence is sufficient than he is entitled to a new trial because of the admission of prejudicial and incompetent evidence. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 8263, 8264 and 8265

UNITED STATES OF AMERICA, *Appellee,*

versus

ALVIN B. SAWYER, *Appellant.*

Appeals from the United States District Court for the Eastern District of North Carolina, at Elizabeth City

CHASE A. CLARK and ALGERNON L. BUTLER, *District Judges.*

(Argued March 28, 1961. Decided August 19, 1961.)

Before SOBELOFF, Chief Judge, and SOPER and BOREMAN, Circuit Judges.

Gerald F. White (M.R. Harshaw on brief) for Appellant; and Harold T. Dodge, Assistant United States Attorney (Julian T. Gaskill, United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

In No. 8265, Alvin B. Sawyer and codefendants, William Edward Griffin and Willie Swain, were indicted for unlawfully possessing, in violation of 26 U.S.C. § 5686(a), property "intended for use in violating the provisions of chapter 51 of Title 26, United States Code, or regulations issued pursuant thereto, to wit, 1260 pounds of sugar and nine 5-gallon jugs." The three were tried together before a jury and found guilty. Sawyer, in prosecuting this appeal, alleges error for failure to grant his motion for judgment of acquittal at the close of the Government's case, a similar motion at the conclusion of all the evidence, error in the admission of evidence and in denial of a motion to set aside the verdict and grant a new trial.

In cases Nos. 8264 and 8263, Sawyer had earlier been convicted of violations of the internal revenue laws relating to the manufacture of nontaxpaid whiskey, had been sentenced and placed on probation. Following the conviction and sentence in No. 8265, upon motion of the Probation Officer, Sawyer's probation was revoked and he was ordered to serve the sentences imposed in earlier cases. He is appealing from the court's orders of revocation of his probation.

Sawyer resides in a rural area about eight miles north of Elizabeth City, North Carolina, on the easterly side of U. S. Highway No. 17. Shortly after midnight and on the early morning of August 14, 1959, State Alcoholic Beverage Control officers, B. V. Halstead and A. D. Baum, and Jack Gaskill, a federal officer of the Alcohol and Tobacco Tax Unit of the United States Treasury Department, went to the neighborhood of the defendant's home where they secreted themselves across the highway from a driveway leading to Sawyer's garage. They were armed with a search warrant and had been keeping the property under surveillance for the past three nights.

The officers testified that, at approximately 2:30 o'clock in the morning, they observed an automobile traveling in a southerly direction along highway No. 17 and, when the automobile was from 200 to 300 yards away, the headlights were turned off, the car slowed down and continued along the highway toward them. On the southerly side of Sawyer's home, and about forty feet therefrom, was a garage approximately one hundred feet back from the highway. Through a gate opening in a fence on the Sawyer property, the car turned from the highway, proceeded down the driveway and stopped in front of the garage. The headlights were still off. One of the occupants got out of the car and, without the aid of any light, opened the double sliding garage doors. The car, with lights still

off, was driven into the garage and the doors were closed from the inside.

Officers Halstead and Baum left their position where they had been hiding and walked up the driveway to the garage. Baum remained at the front and Halstead went to the rear where he stood at an open door. Halstead could hear two men counting and he observed them removing sacks and cartons of sugar from the back seat and trunk of the car. Through a crack in the garage doors, Baum observed two men handling sugar and glass jugs. In the unloading operations the two men, who were identified as William Edward Griffin and Willie Swain, were using flashlights. The officers entered the garage and placed Griffin and Swain under arrest. The officers testified that there were about 1260 pounds of sugar and nine 5-gallon jugs which had been unloaded and arranged on either side of the automobile on the garage floor. The jugs had the odor of and contained drippings from nontaxpaid whiskey. Griffin and Swain were placed in charge of Officer Gaskill, and Officers Halstead and Baum went to Sawyer's residence where, after knocking on the outside door, Sawyer appeared at the front door dressed in trousers and bedroom slippers. He stated that he had been in bed and asleep and that their knocking had aroused him. The officers told Sawyer that they wanted to talk to him about the sugar in the garage and he said he didn't know anything about it. The officers testified that Sawyer went with them to their car where Griffin and Swain were being detained and asked the two boys what they meant by bringing the materials to his garage; that the boys said, "We thought it was the place to bring it but I reckon we were wrong." Upon being notified that a warrant would be issued for his arrest, Sawyer agreed to and did surrender himself at Elizabeth City about nine o'clock in the morning.

Sawyer's property lies between two paralled canals which extend from the easterly side of highway No. 17 into the Pasquotank River some distance to the east of Sawyer's residence. During the daylight hours of August 14, 1959, the officers returned and inspected the Sawyer premises. Officer Halstead observed a path made by wheelbarrow tracks which led from the rear of Sawyer's garage in a northerly direction through a gate along the rear or side of Sawyer's yard to an area which had been used as a garden and to the bank of the canal on the north side of the property where a rowboat, painted a dark green color, was moored in the water. The distance along the path from the rear of the garage to the point where the boat was moored in the canal was stated to be 100 to 150 feet. About 150 yards north of the Sawyer home and on the easterly side of highway No. 17 was a combination grocery store and service station operated by G. M. Hudson. To the rear of this establishment there was a boat basin which connected with the canal and Hudson testified that people used a boatdock or ramp at this basin in launching boats. At the time of the officers' visit, they found two small boats full of water and one halfway up on the bank. None of these boats was painted green..

Using a government boat, the officers explored the canal from the Sawyer premises toward the Pasquotank River. Over objection, they were permitted to testify that, at a point approximately 400 yards down the canal, a camouflaged entrance was discovered on the northerly side of the canal which concealed a path and boarded walkway leading approximately 75 yards through the swamps and woods to an illicit distillery. At the still site, the officers found twenty-six 55-gallon barrels used in fermenting mash and forty pounds of sugar. The still was not in operation. Further, over objection, Halstead testified, on the basis of long experience in investigating illicit distilleries, that fifty pounds of sugar are required

to "mash in" one 55-gallon fermenting barrel and that none of these barrels found at the distillery had been "mashed in"; that it would require exactly 1300 pounds of sugar to "mash in" these barrels and that the sugar found in Sawyer's garage, with the forty pounds found at the still, amounted to exactly 1300 pounds.

Officer Gaskill was asked questions and gave answers as follows:

> "Q. Would you describe what the term 'mashing in' means.
>
> A. Mixture of sugar, meal, yeast and other ingredients as required to make mash.
>
> Q. Is sugar an essential ingredient?
>
> A. Yes, in this section I would say yes; I understand it is possible to make it without the use of sugar, but in this section they generally always use it, wherever a still is we find sugar. * * * "

There was no objection to this testimony.

It was shown that the only means by which access could be had to the still from the canal was the still path hereinbefore described. Officer Gaskill testified that on a tree at the entrance to the still path he found dark green paint. Sawyer was not engaged in the wholesale or retail merchandising business and did not own or operate a store. Witness Hudson testified that he did not order the sugar found in Sawyer's garage in connection with his grocery business. Investigation by the officers indicated that the car in which the materials were transported was registered in a fictitious name.

Over objection, Officer Gaskill further testified that within the previous twelve months he had found another distillery in this general area but that it was located at least twice the distance from the Sawyer residence as the one found on August 14, 1959. In overruling the objection

to this testimony and the testimony concerning the distillery and property discovered near the canal, the court told the jury: "I now instruct you that evidence, if any, relating to the location of illicit distilleries in this locality is admitted for the sole purpose and is to be considered by you only as it may relate to the intent of the defendants." Neither the defendant, Sawyer, nor his codefendant, Griffin, testified at the trial.

The other defendant, Swain, testifying in his own behalf, stated in substance as follows: He was then employed by the Government in the Naval Supply Center at Norfolk, Virginia; shortly before August 14, 1959, an acquaintance known to him only as "Pete" employed him to drive a car on this particular trip; Pete instructed him that he, Pete, would be driving ahead and at a certain time and place would turn and flash three light signals; Swain would then turn into the next "path" to his right; he discovered the sugar in the car only after he was driving on the highway and he had heard that "hauling too much sugar in an automobile was against the law"; he became alarmed; some several miles north of the Sawyer residence, he observed his codefendant, Griffin, an acquaintance, walking in the darkness in a northerly direction along the highway; he stopped and persuaded Griffin to accompany him, promising to return Griffin to his home; the leading car disappeared and gave no light signals; he observed lights to the rear which appeared to be following and he became more freightened; he speeded up, suddenly turned his lights off and drove over to the Hudson service station lot and stopped for two or three minutes; he then continued slowly along the highway in search of a place to unload the materials and make his getaway; upon seeing the Sawyer garage he decided to unload and return home; he did not know Sawyer and had no instructions to deliver the cargo there but did so only when he became frightened by following lights. He admitted that he had driven that highway on several prior occasions, had some

familiarity with the area and knew the location of the service station and two or three other houses.[1]

Counsel for the defendants developed, principally by the testimony of the witness Hudson and by cross-examination of the officers, that the canal between the Sawyer and Hudson properties was sometimes used by strangers for boating and fishing; that access to the canal could be had from the Pasquotank River and that the area back of the Sawyer property was sometimes used by hunters. This evidence was obviously intended to persuade the jury, as well as the court, that persons other than Sawyer had easy access to the canal and to the distillery site.

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[1] On cross-examination, Swain testified in response to questions as follows:

"Q. You didn't stop until you got down to the garage, did you?

A. Not completely.

Q. You didn't have any trouble driving over that driveway, did you?

A. Not too hard; I finally managed to get in there.

Q. You have been there before?

A. *I can't recollect being there.*

Q. Who got out—you or Griffin?

A. I got out.

Q. You opened the garage door?

A. I opened the door.

Q. You did that without any light?

A. That's right.

Q. Without your headlights?

A. No lights at all.

Q. Those rollers make a lot of noise opening the garage?

A. If you are careful you can cut the noise down.

Q. You drove in without lights?

A. Yes.

Q. You didn't scrape the car?

A. I didn't check the car.

Q. You did all that and you say you have never been in the garage before.

A. *I can't recall stopping there.*"

(Emphasis supplied.)

Sawyer contends that the court erred in the admission of the testimony concerning the distillery discovered by the officers on August 14, 1959, the equipment and materials found at the site, the green paint, the quantity of sugar required to "mash in" the fermenter barrels; also the testimony concerning the discovery of another still within twelve months prior to August 1959.

In a prosecution under 26 U.S.C. § 5686(a), the burden is upon the Government to prove (1) possession of the property, and (2) intention that the property is to be used in violation of any provision of chapter 51 of Title 26 U.S.C., or any regulation issued pursuant thereto.[2]

"Possession" means the act or state of possessing and may be either actual or constructive. Ownership is not an essential element of "possession." However, possession, when charged as a crime, must be conscious. Ordinarily, if goods or merchandise were delivered to a man's premises by his arrangement and with his knowledge and consent, he would then have possession within the meaning of the statute.

The question of possession was submitted for jury determination,[3] and we are of the opinion that the evidence

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[2] United States v. Skinner, 272 F. 2d 607, 608 (2d Cir. 1959), cert. denied 362 U. S. 902. It is to be noted that § 5686(b) therein discussed was similar to present § 5686(a).

[3] The court charged the jury "To convict the defendants, or either of them, as charged in the indictment the government must convince you beyond a reasonable doubt of two things: first, that the defendants, or either of them, had in their possession the property described in said count; and, second, that such property was intended for use in violating the Internal Revenue laws. You will note that the indictment charges that the defendants did unlawfully possess certain property intended for illegal use. The law recognizes two kinds of possession, actual possession and constructive possession. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has the

as to possession by Sawyer was sufficient to warrant such submission. It is not disputed that the materials were transported to Sawyer's garage and there unloaded in the dead of night. There was testimony from which the jury could have found that the automobile occupied by Swain and Griffin slowed down when the vehicle was within two or three hundred yards of Sawyer's residence and the vehicle lights were then extinguished; that without perceptible hesitation, the automobile was then driven through the Sawyer gate and up the driveway to the garage, where one of the occupants of the car opened the garage doors, the car was driven in and the doors were closed from the inside; that Griffin and Swain, each using a flashlight, unloaded the car, arranged the containers of sugar on either side of the automobile and counted them as they did so. If the jury believed this testimony, the circumstances therein recited would appear to be in conflict with the testimony of Swain who was apparently endeavoring to convince the court and jury that he was unfamiliar with the Sawyer premises, that he was a frightened individual seeking to hastily dispose of a cargo the transportation of which he believed to be unlawful, and make a getaway. The jurors may well have decided that the actions of Swain and Griffin were not those of frightened individuals entering strange premises, intending to quickly

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power at a given time to exercise dominion or control over a thing is then in constructive possession of it. The law recognizes, also, that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share the actual or constructive possession of a thing, their possession is joint. If you find from the evidence beyond a reasonable doubt that the defendants, either alone or jointly with others, on the 14th day of August, 1959 had actual or constructive possession of materials intended for use in violating the Internal Revenue laws relating to liquor as alleged in the indictment, then you may find that such materials were possessed by the defendants within the meaning of the word 'possessed' as used in these instructions."

abandon a contraband cargo and retreat, but that their conduct supported the strong inference that they were making delivery pursuant to plan.

Having concluded, as the jury obviously did, that possession had been established, the next step was to determine Sawyer's intent as to the use of the sugar and glass jugs.[4]

Sawyer was convicted upon evidence which was almost wholly circumstantial but the court, after explaining fully the meaning of "reasonable doubt," made it perfectly clear that the jury must be convinced, beyond a reasonable doubt, of Sawyer's guilt. Defendant contends that in order to justify a conviction on circumstantial evidence, it is nec-

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[4] The court told the jury: "In determining the issue as to intent, the jury are entitled to consider any statements made and acts done or omitted by the defendants and all facts and circumstances in the evidence in this case which may aid in your determination of the state of mind of the defendants and each of them. The statute makes the intent with which the materials are possessed in his case an element of the crime. This intent must exist prior to or current with the possession of the materials. If the materials were possessed with no intent to use them in violating any provision of the Internal Revenue laws relating to liquor, no crime was committed. It is the possession of materials intended for such illegal use which renders the act criminal. During the course of the trial evidence that illegal distilleries were operating in the general locality of the premises owned and occupied by the defendant Sawyer within one year prior to the date of the arrests in this case was admitted for a restricted purpose. The defendants are not indicted for the possession or operation of any illicit still and evidence that illegal distilleries were operating within this locality is not to be considered by you as indicating that the defendants, or either of them, possessed, operated or had any interest in such stills. You may consider such evidence only in determining the state of mind or intent with which such materials were possessed by the defendants, if you should find that such materials were in fact possessed by them."

Note: There were no objections by either side to any portion of the court's charge to the jury.

essary that the proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. In *Holland* v. *United States*, 348 U. S. 121, 139, 140 (1954), the Court said:

> "* * * The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions [citing cases], but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. [citations omitted].
>
> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

There was evidence of the following facts, Sawyer was not engaged in the mercantile business and it would be a matter of common knowledge that 1260 pounds of sugar would be much more than necessary to meet the normal requirements of one family. On the day the materials were unloaded, a still was discovered approximately 500 yards from Sawyer's residence. It was shown that 1300 pounds of sugar were required to "mash in" the fermenter barrels and that the total amount of sugar found at the still site and in Sawyer's garage was exactly

1300 pounds. A path was discovered leading from the rear of the defendant's garage to the canal along which the still was found, and a boat painted a dark green color was moored at the end of the path. Paint similar in color was found on a tree along the entrance to the still path. The glass jugs which were transported with the sugar contained drippings and the order of nontaxpaid whiskey.

It has been held that where a case rests upon circumstantial evidence, the trial court is allowed a broad discretion in admitting proof of surrounding circumstances. In *Shreve* v. *United States*, 103 F. 2d 796, 803 (9th Cir. 1939), the court said: "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of showing intent." See also *McCoy* v. *United States*, 169 F. 2d 776 (9th Cir. 1948). In *Clark* v. *United States*, 293 F. 301, at page 305 (5th Cir. 1923), it is stated: "It must be borne in mind that the te'mony in the case was almost entirely circumstantial, and under that state of the case the trial court necessarily is allowed a broad discretion in admitting testimony of facts having a bearing on the proof of ...e guilt or innocence of the accused." See also *Merrill* v. *United States*, 40 F. 2d 315 (5th Cir. 1930). In *Clune* v. *United States*, 159 U. S. 590, 592, 593 (1895), the Court held: "It is familiar law that where a case rests upon that character of evidence [circumstantial] much discre'on is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact." And in *Rumely* v. *United States*, 293 F. 532 (2d Cir. 1923), cert. denied 263 U. S. 713, headnote 10 is as follows: "Great latitude is allowed in the reception of circumstantial evidence, especially where it is necessary to show a particular intent in a party as an essential ingredient of the crime with which he is charged." See also *Beard* v. *United States*, 82 F. 2d 837, 843 (D.C. Cir. 1936), cert. denied 298 U. S. 655.

The evidence concerning the discovery of the still on the date of the defendant's arrest goes beyond mere proof of the character of the area. A small quantity of sugar was already at the still and a large amount was necessary to enable the operator to proceed. The "mashing in" process could be commenced when sugar was available. These circumstances were so nearly related to the offense charged in time and place as to provide strong support for the inferences that the sugar was intended for use in the operation of *that particular still* and the whiskey jugs were intended to contain the product. It was not error to admit this evidence as bearing upon intent.

The evidence as to the discovery of another still at a distance of approximately 1,000 yards from the Sawyer premises within the preceding twelve months, at most, would tend to show that this general area was one in which the illegal manufacture of whiskey had been carried on in recent months, and to support the inference that such a large quantity of sugar might more likely be used for illicit distilling purposes in such a neighborhood than in an area where there were no such operations. If it was error to admit such evidence as too remotely related in time and place to the charge contained in the indictment, the error was harmless and will be disregarded.[5] Officer Gaskill testified that in this particular section sugar was generally used in the making of mash—"wherever a still is we find sugar." There was no objection to this testimony. Thus, the character of the area was already clearly established by the discovery of the still on the same day the materials were delivered and by the testimony of the officer.

The contention that the evidence was insufficient to go to the jury and to support the conviction is without merit.

[5] Rule 52(a), Federal Rules of Criminal Procedure:

"Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

In appraising the sufficiency of the evidence, it is not necessary that this court be convinced beyond a reasonable doubt of the guilt of the defendant. On the motions for judgment of acquittal, the question is whether the evidence, viewed in the light most favorable to the prosecution, is such that a jury might find the defendant guilty beyond a reasonable doubt. *Bell* v. *United States*, 185 F. 2d 302 (4th Cir. 1950). The motions for judgment of acquittal and for a new trial were properly denied.

In brief and argument, defense counsel admit that if the conviction in No. 8265 is upheld, the appeals from the court's orders of revocation of probation in Nos. 8264 and 8263 must fail.

Nos. 8265, 8264 and 8263 affirmed.

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No. 403

In the Supreme Court of the United States

OCTOBER TERM, 1961

ALVIN B. SAWYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
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614743—61

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–14a; R. II, 7–21) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on August 19, 1961 (R. II, 23, 28, 33). The petition for a writ of certiorari was filed on September 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for possession of sugar intended for use in violation of the internal revenue laws.

2. Whether evidence as to a hidden distillery, about 500 yards from petitioner's garage where the sugar was found, was admissible.

3. Whether evidence that government agents destroyed two distilleries in the vicinity of petitioner's premises within 12 months prior to his arrest was admissible.

STATUTE INVOLVED

26 U.S.C. 5686, 72 Stat. 1411, provides:

> (a) General—It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

STATEMENT

Petitioner and co-defendants Griffin and Swain were convicted, in the District Court for the Eastern District of North Carolina, of unlawfully possessing property "intended for use in violating the provisions of chapter 51 of Title 26, United States Code, or regulations issued pursuant thereto, to wit, 1,260 pounds of sugar and nine 5-gallon jugs" (Pet. App. 1a; R. I, 102). Petitioner was sentenced to imprisonment for one year and a $500 fine (R. I, 1–3). Following the conviction and sentence, the probation officer moved for revocation of petitioner's probation on prior convictions for violations of the internal revenue laws, and probation was revoked (R. II, 4, 26; R. I, 3–9, 2). On appeals in all three

cases, the court of appeals affirmed (R. II, 4, 26, 31, 23, 28, 33).

Pertinent evidence adduced at the trial in the present case may be summarized as follows:

State officers Halstead and Baum and federal officer Gaskill, armed with a search warrant, went early on August 14, 1959, to the petitioner's premises, on the east side of Highway No. 17 about 8 miles north of Elizabeth City, North Carolina (R. I, 11, 42, 47, 51). There was a house and double garage on the premises. The garage was about 40 feet south of the house and about 100 feet east of the highway (R. I, 15). The officers testified that about 2:30 a.m., they saw proceeding south on highway No. 17 an automobile the lights of which were turned off when about 200 or 300 yards away from the entrance to petitioner's premises. The automobile was then driven into petitioner's garage after one of the occupants alighted from the car and opened the garage doors (R. I, 12, 24, 25, 31, 47, 51–52). (The car was registered in a fictitious name, R. I, 23–24). The officers saw and heard the occupants of the car (the co-defendants Griffin and Swain), both of whom had flashlights, unloading and counting sacks and cartons of sugar within the garage (R. I, 12–13, 47–48). About 1,260 pounds of sugar and nine 5-gallon jugs with drippings from non-taxpaid whiskey were unloaded in the garage (R. I, 13–14, 48–49). Griffin and Swain were arrested and turned over to officer Gaskill (R. I, 17, 52).

Officers Halstead and Baum then knocked on the door of petitioner's house and stated that they wanted

to talk to him about the sugar in the garage. He denied knowing anything about it (R. I, 17). The officers testified that petitioner asked Griffin and Swain what they meant by bringing the materials to his garage and they answered, "We thought it was the place to bring it to but I reckon we were wrong." (R. I, 17, 50, 52). Griffin and Swain stated that they did not know petitioner (R. I, 36, 50). When informed that a warrant would be issued against him, petitioner agreed to (and did) surrender to the authorities at 9 o'clock the next morning (R. I, 52, 63). At the time of apprehension petitioner did not have a wholesale or retail store (R. I, 54–55).

A canal north of petitioner's house runs in an east-west direction about 100 to 150 feet from the garage (R. I, 37, 43). The officers found wheelbarrow tracks leading from petitioner's garage to the back of the canal where a green boat was moored (R. I, 18, 21, 53-54). The officers testified over objection that at a point about 400 yards down the canal they discovered a camouflaged entrance concealing a path and boarded walkway leading approximately 75 yards through the woods to an illicit distillery (R. I, 19, 21, 37). At the entrance to the still path, dark green paint similar to that on the petitioner's boat had rubbed off on a tree (R. I, 53–54). Twenty-six 55-gallon barrels containing spent mash and 40 pounds of sugar were found at the site of the still (R. I, 19, 53). Agent Halstead testified over objection that, as a result of his experience in examining distilleries, it was his opinion that

50 pounds of sugar were required to "mash in"[1] each of the twenty-six 55-gallon barrels, or a total of 1,300 pounds; and that the 1,260 pounds of sugar found at petitioner's garage plus the 40 pounds at the still site totaled 1,300 pounds (R. I, 19–20).

Officer Gaskill testified over objection that, within the 12 months prior to petitioner's arrest, he had assisted in the destruction of two distilleries in this area, one of which was twice as far from petitioner's home as the one found on August 14, 1959. The court instructed, "Gentlemen, this evidence is admitted for the sole purpose and will be considered by you only as it may relate to the intent of the defendants" (R. I, 56).

In its final charge to the jury, the court instructed in part as follows (R. I, 102, 104–105):

> To convict the defendants, or either of them, as charged in the indictment the government must convince you beyond a reasonable doubt of two things: first, that the defendants, or either of them, had in their possession the property described in said count; and, second, that such property was intended for use in violating the Internal Revenue laws. * * *
>
> * * * During the course of the trial evidence that illegal distilleries were operating in the general locality of the premises owned and occupied by the defendant Sawyer within one year prior to the date of the arrests in this case was admitted for a restricted purpose. The defendants are not indicted for the possession or op-

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[1] *I.e.*, needed in the mixture required to make mash (see Pet. App., 5a).

eration of any illicit still and evidence that illegal distilleries were operating within this locality is not to be considered by you as indicating that the defendants, or either of them, possessed, operated or had any interest in such stills. You may consider such evidence only in determining the state of mind or intent with which such materials were possessed by the defendants, if you should find that such materials were in fact possessed by them.

ARGUMENT

1. Petitioner argues that, since the evidence against him was largely circumstantial and did not exclude every reasonable hypothesis but that of guilt, his conviction cannot stand (Pet. 10–11). This, however, is not the federal rule. *Holland* v. *United States,* 348 U.S. 121, 139–140, makes it clear that circumstantial evidence is in the same category as direct evidence when the jury decides as to the existence of a reasonable doubt. All that is required is that there be proof beyond a reasonable doubt. Petitioner did not except to the charge on circumstantial evidence, and the strong circumstantial evidence detailed in the Statement, *supra,* was such that the jury could fairly find guilt beyond a reasonable doubt. The court of appeals so held, after a careful and detailed review of the evidence (Pet. 2a–10a). There is no occasion for further review of the sufficiency of the evidence.

2. The trial court did not err in permitting testimony as to the officers' discovery of the illicit distillery found in the woods approximately 500 yards from petitioner's home, shortly after his arrest (see Pet. 11).

The challenged evidence was relevant as bearing upon the petitioner's intent to use the 1,260 pounds of sugar in the garage. The jury could reasonably infer an intent to use the sugar for the still, to which petitioner had ready access by boat, especially since petitioner was not operating a store where such a large amount of sugar might be held for sale. Moreover, the sugar unloaded in the garage, together with the smaller quantity already at the still, was shown to be sufficient for the operation of that particular still. *Supra*, pp. 4–5.

3. Neither was there reversible error in admitting evidence as to destruction of two distilleries in this area within 12 months preceding petitioner's arrest (see Pet. 11–13). This, too, had a bearing on intent. The court made it clear in its charge that the jury could consider the evidence "* * * only in determining the state of mind or intent with which such materials were possessed by the defendants, if you should find that such materials were in fact possessed by them" (R. I, 104–105).[2]

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[2] Since petitioner's conviction for a federal offense in No. 8265 was sufficiently supported by competent evidence, as we have shown, revocation of his probation in Nos. 8263 and 8264 was proper. One of the probationary conditions was that he should "[r]efrain from the violation of any State and Federal penal laws" (R. II, 2).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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